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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL and ERIK KNUTZEN, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. AT&T CORP., et al. Defendants.	No. C-06-00672-VRW CLASS ACTION PLAINTIFFS' BRIEF ON ORDER TO SHOW CAUSE ISSUED IN THE COURT'S JULY 20, 2006 ORDER Courtroom: 6, 17th Floor Judge: The Hon. Vaughn R. Walker CMC Date: August 8, 2006 CMC TIME: 2:00 p.m.

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Pursuant to the Court's Order of July 20, 2006 ("Order"), plaintiffs provide the following:

I. This Case Should Not Be Stayed

A stay is not automatic when an order is certified for interlocutory appellate review under 28 U.S.C. §1292(b). Here, substantial grounds counsel against any stay. A stay would not serve the public interest, would impose hardships on plaintiffs, and is unnecessary to protect any legitimate government interest. Given the significant delay associated with interlocutory appellate review, which may include Supreme Court review, and the ongoing massive surveillance that plaintiffs allege, any stay risks serious harm to the privacy and security of communications of plaintiffs and millions of other Americans in the interim. The careful, step-by-step procedures crafted by the Court, on the other hand, will fully protect the government's interests without the necessity for a stay. Accordingly, a stay is inappropriate here.

A. The Government Cannot Meet the Legal Standard for Stays Pending Appeal Under 28 U.S.C. Section 1292(b).

"The standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983), *citing Nevada Airlines, Inc. v. Bond*, 622 F.2d 1017, 1018 n. 3 (9th Cir.1980), *rev'd on other grounds*, 463 United States 1328 (1983) (noting the common language of the test for stay pending appeal and the test for a preliminary injunction).

In the Ninth Circuit, there are two tests for the issuance of a preliminary injunction: a showing of either "(1) a combination of probable success and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardship tips in its favor." *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir. 2000) quoting *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987)); *accord Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc); *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986). These tests are "not separate" but rather represent "the outer reaches 'of a single continuum.'" *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir.1980).

"[T]he relative hardship to the parties" is a "critical element" in deciding at which point along the continuum a stay is justified, *Benda v. Grand Lodge of International Association of Machinists and Aerospace Workers*, 584 F.2d 308, 3115 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979). At a minimum, AT&T and the government must show at least a "significant threat of irreparable injury, irrespective of the magnitude of the injury." *Activant Solutions, Inc. v. Wrenchead, Inc*., 2004 WL 1887529 (N.D. Cal. 2004) (quoting *Dr. Seuss Enterprises, LP v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1397 n.1 (9th Cir. 1997)). Moreover, "the less certain the district court is of the likelihood of success on the merits, the more [the movant] must convince the district court that the public interest and balance of hardships tip in their favor." *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 918 (9th Cir.2003) (*en banc, per curiam*). When the public interest will be affected by a potential stay, "the public interest is a factor to be strongly considered." *Lopez v. Heckler*, 713 F.2d at 1432; *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 551 (9th Cir.1977).

As the party seeking a stay, the Government has the burden of proof on these factors.[1] Yet the Government can demonstrate no substantial hardship that would justify a stay. The Court has already made clear its intention to proceed in a cautious, step-by-step manner. It has made clear that it will closely supervise each stage of the proceedings to protect against any harm to national security, the only legitimate hardship the Government can assert here. In light of these protections, the likelihood of harm to national security during the pendency of any interlocutory appeal is minimal. Indeed, the Court's determination that "the very subject matter of this action is not a 'secret,'" (Order at 35:9-10), strongly supports the conclusion that proceeding with this litigation will not harm national security.

In contrast, a stay would impose substantial hardship upon plaintiffs and the millions of other class members. As the Court has recognized, "AT&T's alleged actions here violate the constitutional rights clearly established in *Keith* [*United States v. United States District Court (Keith)*, 407 United States 297 (1972)]." Order at 68:14-15. If AT&T is engaging in the wholesale interception and disclosure of the communications of millions of ordinary Americans in violation of statutes and the Constitution, then irreparable harm is occurring on a massive scale. *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992); *American Federation of Government Employees, Local 1533 v. Cheney*, 754 F. Supp. 1409, 1416 (N.D. Cal. 1990) ("It is established that violation of an individual's constitutional right to be free from unreasonable searches as articulated in the Fourth Amendment causes irreparable harm."); *see also Burlington N. R.R. Co. v. Dep't of Revenue*, 934 F.2d 1064, 1074 (9th Cir. 1991) ("When the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown.") (*quoting Atchison, Topeka and Santa Fe Ry. Co. v. Lennen*, 640 F.2d 255, 259 (10th Cir. 1984)).

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[1] Since the interlocutory appeal is based upon the Court's finding that the state secrets issues "represent controlling questions of law," (Order at 22-27) only the government can seek an appeal under §1292(b). Accordingly, only the Government can seek a stay pending its appeal; AT&T Corp. and AT&T Inc. (collectively "AT&T") cannot.

In addition, there is a strong public interest in protecting the plaintiffs' privacy from dragnet surveillance and in enforcing this nation's constitution and surveillance laws. *See Williams v. Poulos*, 801 F. Supp. 867, 874 (D. Me. 1992) ("There is [a] strong public interest in protecting the privacy and security of communications in a society so heavily dependent on information."); *Gelbard v. United States*, 408 United States 41, 48 (1972) (protection of privacy was an overriding congressional concern in enacting Title III).

In their March 31, 2006, moving papers, plaintiffs have already demonstrated that a preliminary injunction is justified, *i.e.*, that they are likely to prevail on the merits and that the balance of hardships tilts sharply in their favor. (Dkt. 17-22 and 30-32)

Given the magnitude of the harm to the constitutional and statutory interests of plaintiffs and other class members, and the great significance of those interests, discovery and other proceedings should go forward during the pendency of any interlocutory appeal. If the government's public disclosures have been truthful, then a response to plaintiff's motion for preliminary injunction, for example, "should not reveal any new information that would . . . adversely affect national security. And if the government ha[s] not been truthful, the state secrets privilege should not serve as a shield for its false public statements." Order at 39:27-40:3. Moreover, neither the Government nor AT&T will be seriously prejudiced if they are required to respond to limited discovery contemplated by this Court's Order (Order at 44:9-16), or to defend a class certification motion or to respond to discovery for which there is no state secrets claim. These actions will allow the case to move more quickly once appellate review is completed. Accordingly, no stay should be entered pending appellate review.

B. The Court Can Address the Pending Motions Without Any Prejudice to AT&T or the Government.

As an initial matter, there is no harm, let alone the level of harm necessary to justify a stay, that would stem from this Court ruling on the still pending motions during an interlocutory appeal. Those are: (1) AT&T Inc.'s motion to dismiss on jurisdictional grounds (Dkt. 79); (2) the media intervenors' motions to intervene and unseal documents (Dkts. 133 and 139); (3) plaintiffs' letter brief regarding the exhibits to the Marcus Declaration that are already available on the Internet (Dkt. 278); and (4) plaintiffs' administrative motion for designation of class counsel (Dkt. 213). These motions are fully briefed and will require no discovery or disclosure of purportedly state secret material.

C. Discovery and Motion for Preliminary Injunction Schedule if No Stay Is Entered.

If no stay is entered, plaintiffs intend to seek leave from the Court to refile their motion for preliminary injunction and to set a date for oral argument that allows them sufficient time to conduct their requested discovery. Plaintiffs believe that they can fairly quickly amend their motion papers filed in March to take account of recent events and that the most efficient method for conducting discovery is to take the previously noticed F. R. Civ. P. 30(b)(6) deposition of AT&T Corp. (Dkt. 95), as well as some limited third-party discovery.

In light of the Court's Order of July 20, 2006, however, plaintiffs at a minimum request that they be allowed to submit targeted interrogatories to defendants, and that AT&T be required to produce any certifications or other authorizations purporting to allow AT&T to intercept the communications of its customers. Order at 44:9-16.

As explained further below concerning defendants' Answer, if the Government claims that some or all of the information sought by the interrogatories or deposition is protected by the state secrets privilege, the Court can use the process provided in 50 U.S.C. §1806(f) to require the information to be provided *ex parte* and *in camera* to the Court, and the Court can then determine whether the information, in whole or in part, should be disclosed to plaintiffs. *See generally* Plaintiffs' Opp. to Gov't Motion to Dismiss, pp. 21-24 (Dkt. 181) (discussing Section 1806(f)).

D. Regardless of Whether Issues Potentially Implicating State Secrets Are Stayed, the Case Should Continue with Non-State Secrets Discovery, Appointment of a 706 Expert, Class Certification and AT&T's Answer.

In any event, there is no basis for a stay that would encompass more than preventing discovery seeking evidence that the Government contends is a state secret. Much work can be done while any appeal is pending without touching upon discovery of potential state secrets. Given the seriousness of plaintiffs' claims in this case – wholesale ongoing surveillance of millions of ordinary Americans – this Court should take all possible steps to move the case toward permanent relief. Specifically, the following actions should go forward even if some discovery is stayed pending appeal:

First, the Court should appoint a F.R.E. 706 expert as soon as practicable. As explained further below, plaintiffs agree that the appointment of such an expert is appropriate and will be helpful to the case. Appointing the expert now rather than waiting until after appellate review is complete will facilitate the overall efficiency of the case and will allow time for the expert to obtain any necessary specific clearances.

Second, as described above, plaintiffs intend to refile their preliminary injunction motion. While plaintiffs would prefer to conduct the limited discovery they issued in March before refiling their motion, if the Court stays that discovery pending appellate review, plaintiffs believe that the motion can be granted as to some causes of action solely on the evidence already available plus some limited third-party discovery.

Third, plaintiffs would like to proceed with the class certification process, and ask that the Court set a motion schedule. Plaintiffs can file their class certification motion by November 1, 2006**.**

Fourth, if it has not done so by the date of the Case Management Conference, AT&T should be compelled to file its Answer.[2] This Court has already held that information about a certification concerning the interception of communications "would be revealed only at the same level of generality as the government's public disclosures, permitting this discovery should not reveal any new information on the NSA's activities or its intelligence sources or methods, assuming that the government has been truthful" (Order at 44:12-16) and confirmed that "the very subject matter of this action is not a 'secret'" (Order at 35:9-10). Given these findings, AT&T's claims that it cannot provide any portion of its Answer without violating state secrets are unwarranted.

Even if some portions of the Answer might raise states secrets concerns, however, the correct response is not to stay the entire action, but instead to follow the Congressionally created processes for handling claims of national security in such cases, provided in Section 1806(f) of the Foreign Intelligence Surveillance Act. *See* 50 U.S.C. §1806(f); *see also Halpern v. United States*, 258 F.2d 36, 43 (2nd Cir. 1958); *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130 (2d Cir. 1977); *Spock v. United States*, 464 F. Supp. 510, 520 (S.D.N.Y. 1978) (endorsing creative solutions to manage state secrets privilege issues).

Section 1806(f) provides for *in camera* and *ex parte* review of "materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." *See generally* Plaintiffs' Opp. to Gov't Motion to Dismiss, pp. 21-24 (Dkt. 181). Until such time as this Court rules on the extent and scope of the stay, AT&T can file its complete Answer directly in chambers, and can serve and file those portions that do not implicate disputed material on the public record.[3]

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[2] On July 27, 2006, AT&T filed an Administrative Motion seeking an interim stay to prevent it from having to file its Answer by August 3, 2006, when it is due pursuant to F. R. Civ. P. 12(a)(4)(A). Dkt. 310. Plaintiffs will respond to this motion pursuant to the Local Rule, but note that defendants should be held to the full consequences of failing to file a timely answer should they fail to do so by August 3, 2006.

[3] Since the state secrets privilege belongs to the government, AT&T may need some guidance determining which paragraphs to redact. It would seem appropriate for the government to file papers identifying which specific paragraphs of the Complaint it would object to AT&T answering publicly pending the interlocutory appeal.

Finally, significant discovery in this case can be conducted without any implications for state secrets:

1. Discovery into public statements by the Government or its spokespersons regarding any warrantless interceptions of communications or disclosure of calling or data records held or maintained by any telecommunications carrier, including the statements themselves as well as all non-privileged internal documents concerning those statements.

2. Discovery into public statements issued by AT&T or made by its spokespersons regarding any warrantless interceptions of communications traveling over its networks or disclosure of calling or data records held or maintained by AT&T, including the statements themselves as well as all non-privileged internal documents concerning those statements.

3. Third-party discovery to other telecommunications carriers concerning public statements issued by them or statements made by their spokespersons regarding any warrantless interceptions of communications traveling over their networks or disclosure of calling or data records held or maintained by those carriers, including the statements themselves as well as all non-privileged internal documents concerning those statements.

4. Discovery raised by any of AT&T's defenses raised in its Answer that do not implicate the Government's state secrets claims.

5. AT&T's responses to the investigations undertaken by public utility commissions nationwide, as well as the responses of other telecommunications providers, and any non-privileged drafts or preparatory materials.

6. Any statements by AT&T or other telecommunications carriers to the Securities and Exchange Commission regarding warrantless interceptions of communications or disclosure of calling or data records, and any non-privileged drafts or preparatory materials.

7. The recent testimony of AT&T's Chief Executive Officer Edward Whiteacre before the Senate Judiciary Committee and any non-privileged preparatory materials.

8. Responses by AT&T and third-party telecommunications providers to congressional letters concerning warrantless interceptions of communications or disclosure of calling or data records, and any non-privileged drafts or preparatory materials.

9. Discovery into the AT&T network aimed at confirming which communications travel through the San Francisco facility as well as similar facilities referenced in Mr. Klein's declaration and supporting materials and communications.

10. Any contracts between AT&T and the company that provided the sophisticated machinery referenced in Mr. Klein's declaration, plus all supporting materials and communications.

11. All documents regarding the San Francisco facility (and similar facilities) provided to AT&T Inc. during the due diligence portion of the merger between AT&T Corp. and AT&T Inc.

12. All versions and drafts of the documents provided by Mr. Klein.

13. If necessary, jurisdictional discovery regarding AT&T Inc. As the Court is aware, if it grants AT&T Inc.'s motion to dismiss, plaintiffs have sought leave to conduct jurisdictional discovery.

II. The Appointment of an Expert Pursuant to FRE 706 Is Reasonable and Appropriate.

Plaintiffs agree that an expert to assist the Court in evaluating claims of state secrets privilege in this case is warranted and appropriate. Such an expert can help the Court analyze privilege claims arising form specific pieces of evidence, advise about the appropriate disclosures, and ensure that the process moves smoothly and efficiently.

The appointment of an independent expert would also address, to some degree, the fact that only the Government will have the opportunity to offer its own expert testimony concerning the details of potential threats to national security. A court-appointed expert may aid the Court by providing relatively objective expert testimony and may compensate somewhat for the lack of a full adversarial process concerning the Government's state secrets privilege claims.

1. The Court has Legal Authority to Appoint an Expert Under FRE 706.

This Court has the legal authority to appoint an expert under Federal Rule of Evidence 706 to assist it in evaluating Government claims that the state secrets privilege should prevent disclosure of particular pieces of evidence or information.

> While Rule 706 provides no standard for determining when to appoint an expert, the policy underlying the provision supplies some guidance. The policy goal of Rule 706 is to promote accurate factfinding. Accordingly, relevant to the exercise

> of discretion to appoint an expert are several factors associated with the trier-of-fact's need for expert testimony. The most important factor in favor of appointing an expert is that the case involves a complex or esoteric subject beyond the trier-of-fact's ability to adequately understand without expert assistance.

29 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §6304 (2006); *Walker v. American Home Shield Long Term Dis. Plan*, 180 F.3d 1065, 1071 (9th Cir. 1999); *Students of Cal. Sch. for the Blind v. Honig*, 736 F.2d 538, 549 (9th Cir.1984), *vacated on other grounds*, 471 United States 148 (1985); *Gates v. United States*, 707 F.2d 1141, 1144 (10th Cir.1983); *Fugitt v. Jones*, 549 F.2d 1001, 1006 (5th Cir.1977). "No case has been discovered in which it was held that a court does not have the power and right to select an impartial expert witness, and to appoint him, either on the court's motion or that of one of the parties." 95 A.L.R. 2d 390 §2 (2006).

2. Qualifications of the Expert.

Plaintiffs agree that the Court would be aided by an expert who has experience with national security matters in evaluating the Government's expected specific claims of state secrets privilege for individual pieces of evidence used in this case. This is especially true because plaintiffs will likely be unable to provide directly responsive expert testimony to counter the Government's claims.

Additionally, plaintiffs agree that the basic qualifications for the expert laid out by the Court are reasonable, *i.e*. that the expert should have had a security clearance for receipt of highly sensitive information and had extensive experience in intelligence matters.

The expert should not be a current employee of the Executive Branch, or someone who is seeking or intends to seek a position in the Executive Branch in the future. This is to ensure both fairness and the appearance of fairness. For the same reason, the expert should also have no professional or personal ties to plaintiffs or AT&T that would affect his or her ability, or perceived ability, to give the Court impartial advice and information. All of the experts suggested by plaintiffs meet these requirements.

Under FRE 706(b), the compensation to the expert is made in such proportion and at such time as the court directs. Given that the state secrets privilege issue is one that will be raised by the Government, and the amount of work to be done by the expert is entirely dependent on the Government's decision to raise the state secrets privilege in a particular instance, the Government should pay the expert's compensation. Should the court determine that the cost must be shared among the parties, allocation of costs should be determined in a subsequent hearing.

3. Process for Using the Expert.

Plaintiffs believe that the Court should set a process for evaluation of particular state secrets claims that provides the maximum procedural transparency and due process to plaintiffs, and affords the minimum deviation from the normal federal procedural rules.

To that end, for plaintiffs' discovery requests, plaintiffs suggest a process under which plaintiffs first serve discovery requests in the normal fashion, whether on AT&T, the Government or third parties. All such requests will be served on the Government as well. Within five court days after service, the Government shall raise any claims of state secrets, and for each piece of evidence where the Government claims that the state secrets privilege applies, the Government would be required to submit a formal claim of privilege. Specifically, the Government must submit its arguments about the applicability of the privilege, as provided in *Ellsberg v. Mitchell*, 709 F. 2d 51, 61-63 (D.C. Cir. 1983), with redactions as necessary. Plaintiffs should be afforded an opportunity to respond to those portions of the arguments that are not subject to redaction. A similar process should be followed for motions and other situations outside the context of plaintiffs' discovery requests.

Only if the Court finds that the Government has made a prima facie showing that the privilege may properly apply and that the Government has properly limited its redactions to only the material that reflects the potential state secret, or that the Court requires expert assistance to evaluate the claim, should the matter be referred to the expert. This way the expert will not be required if, for instance, plaintiffs are able to demonstrate that the material is already public, is manifestly not a state secret or that it is being withheld in an improper attempt to shield plainly illegal or embarrassing behavior. Once a claim has been referred to the expert, plaintiffs should be informed, to the maximum extent possible, of what material is provided to the expert, what questions are asked of him and what responses are given.

4. Expert Duties.

The Court suggested that the expert could advise the Court on the risks of disclosure of each piece of evidence where the state secrets privilege is claimed and also advise on the manner and extent of any disclosures. Plaintiffs agree that these duties are reasonable, with one caveat: while the expert may advise the Court on the facts and the parties' contentions, the expert should not be given the powers of a special master, or any other authority to make initial decisions, even if the Court ultimately reviews those decisions. Given the importance to this case of the issues at stake in particular state secrets decisions – which could mean the end of judicial review – all such decisions should remain firmly with the Court in the first instance.[4]

Accordingly, the expert's main duty should be to assist the Court in evaluating the facts supporting the Government's state secrets claims once the prima facie finding has been made by the Court. In evaluating the public and non-public facts offered by the Government, the expert can advise the Court on: (1) "support," the extent to which the Government has provided admissible evidence to back up its arguments; (2) "specificity," the extent to which the Government has tailored its arguments to the specific withholdings; and (3) "plausibility," the extent to which the Government has made a clear and convincing factual showing of potential harm, as well as the likelihood of that harm occurring.[5]

Additionally, the expert can assist the Court in determining whether the Government has made a sufficiently specific public explanation. As the *Ellsberg* court noted:

> The more specific the public explanation, the greater the ability of the opposing party to contest it. The ensuing arguments assist the judge in assessing the

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[4] Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining A Role For Court-Appointed Experts In Assessing Scientific Validity*, 43 Emory L.J. 995 at 1010, 1026 (1994) (in a survey of federal judges who have employed Rule 706 powers: "One judge said, 'I instructed [the expert] that his role was to help me and that he was not to decide the case. His main role was to interpret the language to me, give me background on computer technology, tell me how the various systems work.' Similarly, another judge said, '[I] emphasized that I did not want him to give his opinion on the substance of the dispute, but to explain and guide me through the testimony.' Another defined the expert's role as that of 'interpreter.'").

[5] *See* David E. Pozen, *The Mosaic Theory, National Security and the Freedom of Information Act*, 115 Yale L. J. 628, 653-66 (2005).

> risk of harm posed by dissemination of the information in question. This kind of focused debate is of particular aid to the judge when fulfilling his duty to disentangle privileged from non-privileged materials – to ensure that no more is shielded than is necessary to avoid the anticipated injuries.

Ellsberg, 709 F. 2d at 63. Thus the expert can assist the Court in determining whether additional information should be provided to the plaintiffs or to the public.

The expert can also assist the Court in determining the appropriate method of disclosure for each contested piece of information. These levels could range from disclosure to plaintiffs with no restrictions on further disclosure, thus allowing public access to the information, to disclosure to counsel under a protective order or controlled conditions, to disclosure to only certain of plaintiffs' counsel, to disclosure *ex parte* and *in camera* to the Court as anticipated by 50 U.S.C. §1806(f), to disclosure to the Court under additional controlled conditions, such as in Washington D.C. as the Court has already offered. Order at 70:12-21.

Finally, the expert should assist the Court in evaluating the factual situation in order to allow the Court to determine if the privilege is being improperly invoked because the underlying conduct is illegal. *Black v. United States*, 62 F.3d 1115, 1119-20 (8th Cir. 1995) (assessing whether illegal actions barred the Government from invoking privilege and concluding the conduct at issue was legal); *King v. U. S.*, 112 F. 988, 996, (5th Cir. 1902) (holding that certain illegal conduct "do[es] not rise to the dignity of state secrets."). As this Court is aware, an Executive Order expressly bars the Government from designating materials as classified in order to: (1) conceal violations of law, inefficiency or administrative error; (2) prevent embarrassment to a person, organization or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in the interest of the national security. Exec. Order No. 13292 (2003) (amending Exec. Order No. 12958). The Executive Order is attached as Exh. 7 to the Markman Decl. in Opposition to Government Motion to Dismiss or in the Alternative for Summary Judgment (Dkt. 182).[6] While the

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[6] Familiarity with the full scope of the Executive Order is especially important. For example, long after *United States v. Reynolds*, 345 U.S. 1 (1953) was decided, it was revealed that the alleged state secret involved nothing more than Air Force negligence. Hampton Stephens, *Supreme Court Filing Claims Air Force, Government Fraud in 1953 Case*, INSIDE THE AIR FORCE (March 14, 2003)

Court should make all legal judgments required by these tests, the expert can assist the Court in evaluating the facts presented by both the Government and plaintiffs, based on his or her own experience with national security matters.

5. Plaintiffs' Proposed Experts.

In accord with the qualifications discussed above, plaintiffs propose the following three nominees to serve as the Court's expert. Each of the experts proposed by plaintiffs currently holds, or has held, high-level security clearances. We have also attached their resumes as exhibits.

1. ***Louis Fisher***, Specialist, Law Library, Library of Congress.[7] Until earlier this year, Dr. Fisher was the Congressional Research Service ("CRS") Senior Specialist in Separation of Powers, Government and Finance Division. As part of his CRS duties, in 1987 he served as the research director of the House Iran-Contra Committee, and wrote major portions of the Committee's final report. He obtained Top Secret clearance and clearance into compartmented areas, and has maintained those clearances through the present. Dr. Fisher has been invited to testify before Congress on such issues as war powers, executive spending discretion, presidential reorganization authority, Congress and the Constitution, the legislative veto, the item veto, the Gramm-Rudman-Hollings Act, executive privilege, executive lobbying, CIA whistleblowing, covert spending, the pocket veto, recess appointments, the budget process, the balanced budget amendment, biennial budgeting, and presidential impoundment powers. Mr. Fisher's resume is attached as Exhibit A.

2. ***Michael J. Jacobs***, Vice President and Director, Cyber and National Security, SRA International, Inc. After a 38 year career at the National Security Agency, including as Information Assurance Director (December 1997 - March 2002), Mr. Jacobs left the NSA for SRA International, where he is now a Vice President and the Director of Cyber and National Security. At NSA, he held management positions in both Intelligence and Information Assurance. He has testified before

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at http://www.fas.org/sgp/news/2003/03/iaf031403.html. Had the Executive Order been in effect at that time, the state secrets claim in Reynolds would not properly have been made.

[7] On June 29, 2006, Dr. Fisher and Dr. William G. Weaver submitted an *amici curiae* brief concerning the state secrets privilege (Dkt. 54) in *Center for Constitutional Rights, et al. v. George W. Bush, et al.*, No. 06-CV-313-GEL (S.D.N.Y).

Congress on defense issues and has received numerous awards. Mr. Jacobs maintains a Top Secret SCI security clearance. Mr. Jacobs' resume is attached as Exhibit B.

3. ***Kenneth C. Bass, III***, Senior Counsel, Sterne Kessler Goldstein Fox, Washington, D.C. In *In re United States Department of Defense*, 848 F.2d 232 (D.C. Cir. 1988), the Court of Appeals affirmed the District Court's appointment of Mr. Bass, who previously had served as Counsel for Intelligence Policy for the Department of Justice, as Special Master to review thousands of pages of classified documents withheld in a Freedom of Information Act case based on the "national security" FOIA exemption. Mr. Bass has also been a frequent Congressional witness on national security matters in general, and the Foreign Intelligence Surveillance Act in particular. Mr. Bass' resume is attached as Exhibit C.

III. Means for Review of Information for Which the State Secrets Privilege Is Asserted.

Plaintiffs believe that 50 U.S.C. §1806(f) provides the necessary processes for review of claimed state secrets privileged information by this Court, and potentially the parties. While plaintiffs are amenable to any process for court review of such materials that is convenient for the Court and properly protective of any security concerns, plaintiffs know of no reason why the secure facilities in the courthouse for the Northern District of California are insufficient for this purpose. If the court-appointed expert is located in the Northern District, the facility would also be more convenient for that person. We do note that all of the experts suggested by plaintiffs reside in the Washington D.C. area. Since all of plaintiffs' counsel are located in California, plaintiffs would prefer that the facilities in the Northern District courthouse be used for those portions of the record that will be made available to plaintiffs' counsel for inspection under controlled conditions, but can make alternate arrangements if the Court so orders.

DATED: July 31, 2006

Respectfully submitted,

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I, Shana E. Scarlett, am the ECF User whose ID and password are being used to file this PLAINTIFFS' BRIEF ON ORDER TO SHOW CAUSE ISSUED IN THE COURT'S JULY 20, 2006 ORDER. In compliance with General Order 45, X.B., I hereby attest that Cindy A. Cohn has concurred in this filing.

DATED: July 31, 2006

/s/
SHANA E. SCARLETT

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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